IN THE SUPREME COURT OF THE STATE OF MONTANA
OP 17-0322

ROBERT D. BASSETT,
Plaintiff-Appellant,
v.
PAUL LAMANTIA; CITY OF BILLINGS,
Defendants-Appellees.

AMICUS CURIAE BRIEF OF THE MONTANA TRIAL LAWYERS ASSOCIATION

On Certified Question from the United States Court of Appeals for the Ninth Circuit Cause No. DV 15-35045

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ISSUE PRESENTED

Whether the unconstitutional public duty doctrine insulates a government from liability where its acts were the direct and sole cause of harm?

STATEMENT OF THE CASE

This Court accepted the following certified question from the Ninth Circuit:

> Whether, under Montana law, the public duty doctrine shields a law enforcement officer from liability for negligence where the officer is the direct and sole cause of the harm suffered by the plaintiff?

Pursuant to Mont .R. App. 15(4), this Court may reformulate this question pending full consideration of the issue.

STATEMENT OF FACTS

The Ninth Circuit's Order Certifying the question to the Montana Supreme Court states the factual background of the case and it will not be repeated here. After reading the parties' briefing to the Ninth Circuit, it is clear that many of the facts relayed by the Ninth Circuit are contested by the Plaintiff. However, disputes on facts relevant to whether Officer Lamantia was negligent are for a jury's consideration. That Officer's Lamantia's conduct, rather than the conduct of any third party, was the direct and sole cause of harm to Bassett is uncontested and is the most important fact to the issue presented by the Ninth Circuit.

SUMMARY OF ARGUMENT

The public duty doctrine has historically been employed to insulate a government from liability where it failed to protect a plaintiff from harm caused by a third person. In no case, however, has the doctrine insulated a government where its agent actually caused harm to the plaintiff. In such a case, the government may be held accountable if, through its agent, it acted negligently.

Without the doctrine, the government is not automatically liable. Rather, its conduct is judged against the applicable standard of care. If a police officer uses force, such force may be justifiable under the circumstances, meet the standard of care and not be negligent. On the other hand, the conduct may be excessive with the conduct falling below the standard of care. In such a case, the government may be held accountable.

Not only should the Court refrain from expanding the public duty doctrine to immunize a governmental entity where its own acts were the direct and sole cause of harm, but it should also take this opportunity to declare the public duty doctrine unconstitutional in light of Montana's unequivocal abrogation of sovereign immunity unless re-instated by 2/3 majority of the legislature.

The public duty doctrine has been rejected in most jurisdictions that have abrogated sovereign immunity because it is "confusing and leads to inequitable, unpredictable, and irreconcilable results." *Hudson v. Town of East Montpelier*, 638

A.2d 561, 566 (Vt. 1993). Those jurisdictions that have done away with the doctrine persuasively dispel notions that the government would be hopelessly mired in litigation without it:

> Concerns over excessive government or public employee liability are baseless considering the limitations on liability afforded by conventional tort principles, various types of official immunity, or exceptions to waivers of sovereign immunity.

Id.

Despite Montana's progressive stance on sovereign immunity in 1972, the state has lagged in dispelling its vestige companion, the public duty doctrine. Amicus respectfully requests that this Court answer the Ninth Circuit's question by stating that the public duty doctrine is not constitutional in Montana, and therefore does not provide immunity to the officer or the City of Billings in this case. Doing so will relieve district courts of the confusing and burdensome task of analyzing whether the doctrine applies, or whether any of the special relationship exceptions to the doctrine apply. Little authority guides courts in such inquiries. However, the district courts have access to thousands of opinions analyzing whether a defendant acted negligently under common law tort principles.

DISCUSSION

A. The Public Duty Doctrine Should Not Be Expanded to Immunize the State Where Its Own Acts Cause Harm.

This Court has previously held that "a law enforcement officer has no duty to ***protect*** a particular person absent a special relationship because the officer's duty to protect and preserve the peace is owed to the public at large and not to individual members of the public." *Gonzales v. City of Bozeman*, 2009 MT 277, ¶ 20, 352 Mont. 145, 150, 217 P.3d 487, 491 (citing *Nelson v. Driscoll,* 1999 MT 193, ¶ 21, 295 Mont. 363, 983 P.2d 972; *Eves v. Anaconda–Deer Lodge Co.*, 2005 MT 157, ¶ 9, 327 Mont. 437, 114 P.3d 1037) (emphasis added).

This Court has never, however, held that a law enforcement officer has no duty to refrain from negligently harming a person. To the contrary, in *Scott v. Henrich,* where officers shot the plaintiff's husband, this Court did not apply the public duty doctrine but instead held that the reasonable and prudent person standard applied. 958 P.2d 709, 711 (Mont. 1998). The facts here are similar in that the injury alleged arises solely from Officer Lamantia's conduct, not the actions of a third party. Therefore, the public duty doctrine is not applicable and Officer Lamantia owed a general duty of care, obligating him to act as "a reasonable and prudent person [would] under the circumstances in accordance with traditional negligence standards in Montana." *See Scott* at 958 P.2d 709, 711; *see also Ratcliff v. City of Red Lodge*, No. CV 12-79-BLG-DWM-JCL, 2014 WL 526695 at *7 (D.

Mont. Feb. 7, 2014) (rev'd on other grounds in *Ratcliff v. City of Red Lodge, Dep't of Police Montana*, 650 F. App'x 484 (9th Cir. 2016).

As stated by the U.S. District Court in the District of Columbia in *Liser v. Smith*, "[the public duty doctrine] is wholly inapposite in a case such as this, where the alleged harm was brought about directly by the officers themselves, and where there is no allegation of a failure to protect. The claim that the government has no general duty to protect particular citizens from injury is simply a non-sequitur where the government itself is solely responsible for that injury, which it has caused by the allegedly negligent use of its own police powers." 254 F. Supp. 2d 89, 102 (D.D.C. 2003) *see also Dist. of Columbia v. Evans*, 644 A.2d 1008, 1017 n. 8 (D.C. 1994) ("In this case, the harm ... was caused directly by the officers at the scene. There is no allegation of failure to protect. The public duty doctrine, therefore, has no relevance to this case."); *Bates v. Doria*, 150 Ill. App. 3d 1025, 104 Ill. Dec. 191, 502 N.E.2d 454, 458 (1986) ("The public duty doctrine is inapplicable to the present case where plaintiff seeks to impose liability based upon the defendants' negligent employment of a law enforcement officer [who allegedly raped and assaulted the plaintiff], not upon defendants' failure to prevent the commission of crimes."); *Jones v. State*, 425 Md. 1, 24-25, 38 A.3d 333, 346-47 (2012) (same).

Montana should not illogically expand the public duty doctrine to shield an officer or a governmental entity from liability where it is the direct cause of harm to an injured plaintiff.

B. The Public Duty Doctrine is Unconstitutional in Montana Because It Is a Vestige of Sovereign Immunity.

Not only should this Court avoid expanding the public duty doctrine, but it should take this opportunity to declare that the public duty doctrine is unconstitutional. The 1972 Constitution abrogated sovereign immunity in Montana. Mont. Const. art. II, § 18, states:

> The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a 2/3 vote of each house of the legislature.

It was the clear intention of the delegates to fully repeal sovereign immunity in order to increase governmental accountability and provide Montanans with adequate remedies when injured by a government's negligence. Delegate Murray stated at the 1972 Constitutional Convention,

> We feel that the doctrine of sovereign immunity, which we are attempting to do away with by this particular provision, really means that the king can do whatever he wants but he doesn't have to pay for it; and we'd like to do away with that doctrine."

Montana Constitutional Convention, Transcripts of Proceedings, vol. 7, 5428 (1972) [hereinafter *Transcripts*].

Delegate Dahood added:

> It's an inalienable right to have remedy when someone injures you through negligence and through a wrongdoing, regardless of whether he has the status of a governmental servant or not."

Transcripts at 5439.

The public duty doctrine is a type of sovereign immunity. In *Rahrer v. Bd. of Psychologists,* the Court described sovereign immunity as "the legal doctrine which 'bars tort suits against the state for negligent acts by its officials and employees.'" 2000 MT 9, ¶ 11, 298 Mont. 28, 993 P.2d 680. The public duty doctrine, likewise, precludes recovery against the state for negligent acts of officials and employees. As observed by the Colorado Supreme Court:

> The effect of the public duty doctrine is identical to that of sovereign immunity. Under both doctrines, the existence of liability depends entirely upon the public status of the defendant."

Leake v. Cain, 720 P.2d 152, 159 (Colo. 1986).

The public duty doctrine has survived in Montana long past its obsolescence. When the delegates to Montana's 1973 Constitutional Convention abrogated sovereign immunity by passing Mont. Const. art. II, § 18, they noted specifically that stare decisis should not preserve any vestige of sovereign immunity:

> [I]t is our intention to remove this particular doctrine because the Supreme Court, when it has been confronted with this particular issue, has said, well, we have had it all these years and we don't want to remove it….. We have an opportunity now, as long as in Montana no one else will accept it, to make sure that we have full redress and full justice for all of our citizens."

Transcripts at 5439.

By abrogating sovereign immunity, the delegates hoped to increase the accountability of governments and their agents. Delegate Murray stated that the possibility of liability in a lawsuit makes the government "responsible to us." *Transcripts* at 5434. This accountability would in turn "reduce public dissatisfaction with the administration of justice." *Transcripts* at 5439. By retaining the public duty doctrine as a vestige of sovereign immunity, the Court would take two steps back from the "epistle to justice in the state of Montana" promulgated by the delegates to "improve its administration for the benefit of all." *Transcripts* at 5440.

C. Policy Considerations in Support of the Public Duty Doctrine Fail to Justify its Retention.

The two principal rationales implicated to retain the public duty doctrine are generally: (1) protection against excessive governmental liability, and (2) the need to prevent hindrance of the governing process." *Leake*, 720 P.2d at 159. Both principles have been rejected as providing justification for sovereign immunity in Montana and should not validate the public duty doctrine.

At the 1972 Constitutional Convention, the delegates addressed the financial impact removing sovereign immunity would have upon the state's finances, and accepted that burden in large part because of the availability of insurance. *Transcripts* at 5433-34. Further, the financial-impact that abrogation of the public

duty doctrine would have is mitigated by Mont. Code Ann. § 2-9-108, which limits the liability of the state and political subdivisions.

No government in Montana will be unduly mired in litigation without the public duty doctrine. In *Prindell v. Ravalli Co.*, this Court did not consider the public duty doctrine because the county failed to explicitly raise it as a defense. 2006 MT 62, ¶ 25, 331 Mont. 338, 133 P.3d 165. The Court, nevertheless, undertook an exhaustive investigation into the government's duty according to obligations imposed by statute, as well as common law duties created through custody, foreseeability and policy considerations, finding these traditional tort tests adequate and sufficient tools to assess whether the government had a duty to the plaintiff. *Id.* at ¶¶ 22-24, 29-46.

In *Gonzales*, the Court indicated that the public duty doctrine, used in conjunction with its exceptions, may be used like a test, solely applicable to governments, to determine whether a duty exists to a private citizen. *Gonzales*, ¶ 21. This "test," however, is inferior to that which has evolved in traditional tort law to determine whether a duty exists between private parties, and may therefore better and more predictably protect the government from undue hindrance or excessive liability.

In *Leake*, the Colorado Supreme Court rejected using the public duty doctrine as a test for determining duty, as suggested by the *Gonzales* Court. 720

P.2d at 159. The *Leake* court reasoned that determining whether there is an actionable duty is "more effectively determined by resort to the familiar principles of foreseeability and by balancing the social utility of the defendant's conduct against the risk of harm resulting from such conduct." *Id.*

In Montana, it is more effective and reliable to determine whether a duty exists using those well-tested and familiar common law tort principles, such as: "(1) the moral blame attached to a defendant's conduct; (2) the prevention of future harm; (3) the extent of the burden placed on the defendant; (4) the consequences to the public of imposing such a duty; and (5) the availability and cost of insurance for the risk involved." *Jackson v. State*, 287 Mont. 473, 487, 956 P.2d 35, 43 (1998). These principles are well established in Montana and are no less useful when applied to governments than private citizens.

Using the public duty doctrine as a "test" in lieu of familiar tort principles runs contrary to the reasoning behind abrogating sovereign immunity. The Bill of Rights Committee at the 1972 Constitutional Convention noted, "Just as the government administers a system of justice between private parties it should administer the system when the government itself is alleged to have committed an injustice." *Montana Constitutional Convention, Verbatim Transcripts*, vol. II, 637-38 (1972). Delegate Dahood further commented, "Lets judge cases on the merit, on

the principle of what's fair and what's right between man and woman in an organized society." *Transcripts* at 5440.

Abrogation of the public duty doctrine creates no new cause of action and threatens no great injustice to the state, which may continue to invoke all the same defenses afforded to the rest of Montanans. Preserving the doctrine, however, does threaten injustice to those injured by the state, as governmental immunity leads to harsh results for injured parties. The Court should follow in the footsteps of many jurisdictions and join stride with the trend in the United States to discard this remnant of sovereign immunity.[1]

D. The Public Duty Doctrine Creates Needless Confusion and Inequitable Results.

If it applies, the public duty doctrine requires plaintiffs to attempt to prove that their case fits into one of the four exceptions to the public duty rule and requires judges to interpret the exceptions. Interpretation of the exceptions allows

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[1] In the following cases, the public duty doctrine has been addressed and discarded in light of the state's abrogation of sovereign immunity: *Adams v. State*, 555 P.2d 235 (Alaska 1976); *Ryan v. State*, 656 P.2d 597 (Ariz. 1982); *Leake v. Cain*, 720 P.2d 152 (Colo. 1986); *Commercial Carrier Corp. v. Indian River Co.*, 371 So.2d 1010 (Fla. 1979); *Fowler v. Roberts*, 556 So.2d 1 (La. 1989); *Jean W. v. Commonwealth*, 610 N.E.2d 305 (Mass. 1993); *Maple v. Omaha*, 384 N.W.2d 254 (Neb. 1986); *Doucette v. Town of Bristol*, 635 A.2d 1387 (N.H. 1993); *Schear v. Bd. of Co. Comm'rs*, 687 P.2d 728 (N.M. 1984); *Wallace v. Ohio DOC*, 773 N.E.2d 1018 (Ohio 2002); *Brennen v. Eugene*, 591 P.2d 719 (Or. 1979); *Coffey v. Milwaukee*, 247 N.W.2d 132 (Wis. 1976); *DeWald v. State*, 719 P.2d 643 (Wyo. 1986).

the doctrine to expand and contract, leaving the law in this area unpredictable because there is much less authority available on the public duty doctrine's exceptions compared to traditional tort law.

Most troubling of all exceptions, because it is subject to the greatest variance of interpretation, is the first – whether a statute was "intended to protect a class of citizens."[2] This questions turns on whether the statute provides broad protection to the citizenry, or if it protects a specific class.

In *Prosser v. Kennedy*, the Court was faced with the question of whether city development ordinances intended to protect a particular class. 2008 MT 87, ¶ 20, 342 Mont. 209, 179 P.3d 1178. The majority in *Prosser* looked not to the intent of the specific ordinances placed into question but to Hamilton's zoning ordinances as a whole to determine whether the statutes created a special duty. *Id.* at ¶ 22-23. The Court held that because the zoning code, in its entirety, was created to protect the general community, it did not create a specific duty to any citizen. *Id.* at ¶ 22.

Justice Nelson, dissenting, criticized that when a statutory scheme is created to promote the general welfare, this purpose does not mean certain provisions within the scheme do not protect a specific class. *Id.* at ¶ 62 (Nelson J. dissenting).

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[2] A special relationship may be created by a statute that is intended to protect a specific class of persons from a particular type of harm and the plaintiff is a member of that class. *Nelson v. Driscoll*, 1999 MT 193, ¶ 21, 295 Mont. 363, 983 P.2d 972.

Justice Nelson points out that applying this reasoning to *Massee*, the surviving sons would have been denied recovery because Title 46 of the Code of Criminal Procedure could reasonably be characterized as promoting general welfare. "Indeed, the rather sweeping purpose of "promoting general welfare" could apply to just about every title in the Code." *Id.* at ¶ 63. Therefore, by adopting a particular method of statutory interpretation, the public duty doctrine allows courts to reach disparate results.

As another example, in *Orr v. State*, a negligence action brought by Libby miners was not barred by the public duty doctrine because the Court did find a special duty created by a 1907 statute requiring the State Board of Health to conduct studies into the causes of occupational diseases. 2004 MT 354, ¶ 44, 324 Mont. 391,106 P.3d 100.

The *Orr* Court acknowledged that many principles for interpreting statutes have been developed. *Id.* at ¶ 25. The Court applied a method of statutory interpretation called "last antecedent." This method of interpretation requires that statutory language is construed to relate to the nearest antecedent that will make sense. *Id.*

The Court interpreted § 1474, R.C.M., originally enacted in 1907, which states that the State Board of Health shall "encourage and conduct studies, investigations, and research relating to occupational diseases and their causes,

effects, prevention, abatement, and control," and shall "gather such information in respect to all these matters as it may deem proper for diffusion among and use by the people" *Id.* at ¶¶ 14-21.

Using the "last antecedent" method, the Court held that the second part of the sentence, "for diffusion among and use by the people" was not modified by the permissive "as it may deem proper." Therefore, the obligation to diffuse information was mandatory.

In *Orr*, Justice Warner dissented, accusing the majority of "judicial alchemy." He wrote that by "ripping the phrase, 'for diffusion among the people' from the statute mid-phrase, the Court removes it from its context and from its meaning, magically turning it into a 'mandatory obligation' which the Court insists existed from 1907 through 1999." *Id.* at ¶ 109 (Warner, J. dissenting).

These cases are highlighted to show that using the public duty doctrine forces courts to wade into often confusing statutory interpretations in order to assess whether a special exception applies to the public duty doctrine. Because these analyses are underdeveloped, as compared to the well-established tort-principles of duty, retaining the doctrine threatens inequitable and inconsistent results.

In *Ryan v. State*, the Supreme Court of Arizona acknowledged the inequities presented by the statutory interpretation necessitated by the public duty doctrine to

determine whether a statute creates a general or specific duty. In *Ryan,* the Arizona Court solved this difficulty by doing away with the PDD, stating:

> We shall no longer engage in the speculative exercise of determining whether the tort-feasor has a general duty to the injured party, which spells no recovery, or if he had a specific individual duty which means recovery.

656 P.2d 597, 599 (Ariz. 1982).

These difficulties inherent in applying the public duty doctrine demonstrate that traditional tort theories of negligence are superior tools in assessing the existence of a duty.

E. The Public Duty Doctrine Is Not Well-Established Montana Law.

Stare decisis promotes "stability, predictability and equal treatment...." *Montana v. Gatts,* 279 Mont. 42, 51 928 P.2d 114, 119 (1996). The sole case in which the constitutionality of the PDD was challenged and no exceptions to the PDD applied was *Eves v. Anaconda-Deer Lodge Co.*, 2005 MT 157, 327 Mont. 437, 114 P.3d 1037. However, in *Eves*, no analysis of the validity of the public duty doctrine was undertaken. Because no Montana majority opinion has squarely addressed the constitutionality of the public duty doctrine, stare decisis does not justify retention of the doctrine. This is especially true where the public duty doctrine inhibits the stability, predictability and equal protection provided by Montana law.

CONCLUSION

Expanding the public duty doctrine to insulate governments from liability where it was the sole and direct cause of harm would be inequitable and illogical. In addition, the public duty doctrine should no longer be recognized in Montana as it is a form of sovereign immunity which was abrogated in Montana by article II, § 18 of the Constitution.

The public duty doctrine exists only through judicial invention. By effectively providing governmental immunity from tort in the absence of an explicit legislative grant of such immunity, the doctrine serves as an end-around the fundamental right of individuals to sue local government entities for injury to person or property. In Montana, the citizens have chosen to hold their government responsible in the same way ordinary Montanans are accountable for their own negligence. The public duty doctrine frustrates this policy, and judicially re-institutes sovereign immunity and the king who can do no wrong.

DATED this 17th day of July 2017.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing *AMICUS CURIAE* BRIEF OF THE MONTANA TRIAL LAWYERS ASSOCIATION is proportionately spaced in 14-point roman, non-script text and contains 3,691 words excluding brief's cover, table of contents, table of authorities and certificate of compliance.

DATED this 17th day of July 2017.

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